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Farmers' Rights in International Law: Multiple Regimes and Implications for Conceptualisation

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1. Introduction

Farmers have traditionally followed a system of sharing the resources and knowledge. Farmers followed the practice of saving, using, exchanging and selling seeds and propagating materials from their own harvest. Therefore, the development of crop genetic resources in the past could be considered as a result of collective action. Farmers have played major roles in the preservation and development of plant genetic resources. Public sector undertakings also have played crucial role in this regard. The concept of farmer's right takes its root in this traditional contribution made by the farming community across the world. It also takes into account the future contributions that are very crucial in human rights and environmental grounds.

The significance of a legal regime for crop genetic resources vis-à-vis farmer's right lies in the role played by agriculture on various aspects. from farmers point of view, access to and the use of crop resources is critical to the realisation of their right to livelihood. This aspect is particularly significant in a developing country point of view where majority depends upon agriculture for livelihood. In a general perspective, a cherished agricultural sector is a factor determining realisation of the right to food which has been recognised under international human rights law. Plant genetic resources also play important role in maintaining biodiversity.

The discourse on farmer's right in international legal regime has been prevalent since the early 1980s. This could be seen as a response to the development of the commercialisation of agriculture and agricultural biotechnology. Conceptually, it could be valued as a counter-balance to the legal regime of Plant Breeder's Right which recognises and protects the commercial interests of plant breeders. The political and legal argument in favour of farmer's right gained momentum in post WTO scenario because the TRIPS agreement contains provision for the protection of plant varieties. The TRIPS agreement requires every member countries to provide plant variety protection either through patents or through a *sui generis* system.

The evolution of farmer's right, as a legal concept, is said to have initiated in the early 1980s by the Food and Agriculture Organisation through its various conferences. The major focus was on plant genetic resources for food and agriculture. An International Undertaking was

adopted in 1983 which followed the principle that plant genetic resources are a common heritage. The concept of common heritage refers to the treatment of genetic resources as belonging to the public domain and not owned or otherwise monopolised by a single group or interest. This further implies open access and non-exclusion to seeds and plants from farmer's fields.

The common heritage approach is no longer dominant in the legal discourse due to significant changes in the international legal regime. One of the important changes is the express recognition of farmer's right in binding treaties –for instance in the International Treaty for Plant Genetic Resources for Food and Agriculture of 2001. Presently, the international legal regime on farmer's right vis-à-vis plant genetic resources includes mainly the Convention on Biological Diversity of 1992, TRIPS of 1994 and the International Treaty for Plant Genetic Resources for Food and Agriculture of 2001 (FAO treaty). Several legal concepts such as state sovereignty over natural resources, access to and benefit sharing of resources and plant breeder's right have been incorporated in these treaties having implications upon farmer' right. In addition to that, international human rights law also contain provisions linked to the concept of farmer's right such as the right to food under the International Covenant on Economic, Social and Cultural Rights.

It could be seen that the concept of farmer's right has been endorsed in more than one legal instrument. Therefore, the concept needs to be examined within the context of each instruments and the nature and scope of the concept is most likely to vary from one regime to other. There are, at least, three different but complementary international legal regimes that deal directly or indirectly with farmers' rights. Among these multilateral treaties, FAO Treaty expressly addresses farmers' rights. At the same time, multilateral treaties such as the Convention on Biological Diversity and the UPOV Convention refer to farmers' rights indirectly. In this background, this paper examines these legal regimes that deal with farmers' rights.

2. The FAO Treaty: potential and limitations

A. Salient Features of FAO Treaty

FAO Treaty was adopted to pursue mainly two objectives; first, conservation and sustainable use of plant genetic resources for food and agriculture and second, fair and equitable sharing of benefits arising out of the use of plant genetic resources. The FAO Treaty seeks to achieve these objectives by providing a multilateral system to facilitate access to plant genetic resources and sharing of benefits arising out of their use and by recognising farmers' rights.[1] Hence, the key features of the FAO Treaty could be summarised as access, benefit sharing and farmers' rights.

The underlying principle of the multilateral access regime under the FAO Treaty is the sovereignty of states over their plant genetic resources for food and agriculture. This principle is further asserted by providing that "…the authority to determine access to those resources rests with national governments and is subject to national legislation" (Ibid: Article 9 and 10).

Facilitated access to plant genetic resources envisaged under the multilateral system is not applicable to all plant genetic resources for food and agriculture. Specific limits are mentioned under the Treaty. Firstly, access is limited to plant genetic resources enlisted in Annex I. There are thirty five crop species and twenty nine forage species covered in Annex I. Access is further limited to those species that are under the "management and control of Contracting Parties and in the public domain" (Article 9 and 11.2). Hence, plant genetic resources in the control and management of private individuals and companies, even if they are in Annex I, are not subject to the rules of the multilateral system. This means there will not be "facilitated access" to plant genetic resources under private control and management.

Access is also restricted in terms of purposes for which plant genetic resources may be used. The FAO Treaty clearly states that "access shall be provided solely for the purpose of utilization and conservation for research, breeding and training for food and agriculture" (Article 12.3.a). This restriction is further clarified by providing that any resources accessed

[1] *Id*., Article 9 and 10.

through the multilateral system shall not be used for "chemical, pharmaceutical and/or non-food/feed industrial uses" (Article 12.3.a). This exclusion of purposes not related to food and agriculture implies that access to plant genetic resources for such excluded purposes will be regulated under the CBD regime.

Access to plant genetic resources included in the multilateral system is also subject to various conditions. These conditions include the duty of the provider to provide access expeditiously and free of charge, duty of recipients not to claim intellectual property rights and the duty of the provider to make available all passport data and other non-confidential descriptive information (Article 12.3).

FAO Treaty recognises that facilitated access to plant genetic resources under the multilateral system itself constitutes a major benefit (Article 13.1). Nevertheless, the FAO Treaty illustrates several other means through which fair and equitable benefit sharing may be achieved. They are: exchange of information, access to and transfer of technology, capacity building and sharing of monetary and other benefits of commercialisation (Ibid: Article 13.2). However, the norms on benefit sharing are subject to intellectual property rights. For instance, it is provided that access to technologies shall be provided by respecting applicable property rights (Article 12.2.b.i).

The mechanism of sharing of monetary benefits is designed in such a way that a recipient who commercialises a product with the help of material(s) accessed from the multilateral system is required to pay to the mechanism. This means, the FAO Treaty does not envisage a system of benefit sharing directly between parties. Benefits are intended to reach in various other forms such as conservation measures and capacity building assistance from the mechanism. This benefit sharing mechanism in the context of farmers' rights, seems to have borrowed from the International Undertaking. Because the International Undertaking considered the ensuring of conservation, management and use of plant genetic resources for the benefit of present and future generations of farmers as "the best way to implement the concept of farmers' rights".[2]

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[2] International Undertaking for Plant Genetic Resources, 1983, FAO Resolution 8/83, 22nd Session, Rome, 5-23 November 1983, Doc. C83/REP: Annex I, Para. 4.

It is to be noted in this context that, in 2009, the benefit sharing mechanism under the FAO Treaty has started functioning with the help of voluntary contribution mainly from Norway, Spain, Italy and Switzerland amounting to a total of US Dollar 5,81,088. The Governing Body in its third session held in Tunis, Tunisia, from **1 to 5 June 2009** approved eleven projects from different regions for funding.[3]

The norm of facilitated access and benefit sharing is further effectuated through a material transfer agreement between a provider and a recipient.[4] The SMTA is a key tool for translating the language of the FAO Treaty into contractual obligations for recipients of materials from the multilateral system (Correa 2006). To this effect, governing body has developed a SMTA through Resolution 1/2006 of 16 June 2006. The SMTA is mandatory to access plant genetic resources included in the multilateral system. Hence, in addition to the provisions under the FAO Treaty, the access and benefit sharing will be regulated by the SMTA. Indeed, the SMTA reiterates all key norms provided under the FAO Treaty and provides rules regarding rights and duties of provider and recipient, dispute settlement and payment mechanisms available for recipients.

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[3] The third session of the Governing Body has approved total eleven projects. Allocation of projects is as follows: Four from the African Region – Kenya, Morocco, Senegal and Tanzania; five from the Latin American and Caribbean Region – Costa Rica, Cuba, Nicaragua, Peru and Uruguay; one Asia – India and One from Egypt. The approved project from India has been submitted by Peermade Development Society – a non-governmental organisation situated in the state of Kerala. Major objectives of the project are Conservation, dissemination and popularization of location specific farmer-developed varieties by establishing village level enterprises. For details regarding other projects, *see* Approval of the First Projects under the Benefit-sharing Fund, document of the Third Session of the Governing Body held in Tunis, Tunisia, from **1 to 5 June 2009, Doc. No.** IT/GB-3/09/Inf. 11, URL: ftp://ftp.fao.org/ag/agp/planttreaty/gb3/gb3i11e.pdf.

[4] Article 12.4 of the FAO Treaty states that: "To this effect, facilitated access, in accordance with articles 12.2 and 12.3 above, shall be provided pursuant to a standard material transfer agreement (MTA), which shall be adopted by the Governing Body and contain the provisions of articles 12.3(a), d and g, as well as the benefit-sharing provisions set forth in article 13.2(d)(ii) and other relevant provisions of this Treaty, and the provision that the recipient of the plant genetic resources for food and agriculture shall require that the conditions of the MTA shall apply to the transfer of plant genetic resources for food and agriculture to another person or entity, as well as to any subsequent transfers of those plant genetic resources for food and agriculture".

B. Definition of Farmers' Rights under FAO Treaty

Until the adoption of the FAO Treaty, the often referred definition of farmers' rights is the one provided under the International Undertaking which defines farmers' rights as:

> "...rights arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources, particularly those in centers of origin/diversity. These rights are vested in the International Community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers, and supporting the continuation of their contributions, as well as the attainment of the overall purposes of the International Undertaking".[5]

The definition as provided under the International Undertaking has two main features. First, it considers the contribution of farmers in "conserving, improving, and making available plant genetic resources" as the basis of farmers' rights. Second, the concept is defined in such a way that whatever rights emanating from the concept are not directly available to farmers. It is expressly stated that international community is the holder of these rights as a trustee for present and future generations of farmers.

An analysis of this definition reveals that the International Undertaking stops at recognising formally the contributions of farmers towards the conservation and development of plant genetic resources. The recognition is sought to materialise in the form of assistance for conservation of plant genetic resources. The definition provided under International Undertaking does not include any rights of farmers over their intellectual assets or traditional knowledge. It does not define any kind of ascertainable individual or collective property right over their intellectual assets. This could be the reason which prompts the critique to evaluate the International Undertaking as a document which is little more than a policy statement by the international community having very little practical impacts (Cullet 2005: 239).

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[5] *See* International Undertaking for Plant Genetic Resources, note 2 above, Annex II.

However, with the adoption of the FAO Treaty, the relevance of the definition provided under the International Undertaking mostly confines to its normative importance. This is primarily because of the legal status of the FAO Treaty being a legally binding instrument at the international level. FAO Treaty is the only source in international law where the term 'farmers' rights' has been mentioned explicitly. Article 9 of the FAO Treaty expressly uses the term 'farmers' rights'.

Article 9 of the FAO Treaty states that:

> 9.1 The Contracting Parties recognize the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.
>
> 9.2 The Contracting Parties agree that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including:
>
> (a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
>
> (b) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and
>
> (c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.
>
> 9.3 Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.

FAO Treaty emphasises farmers' contributions for the conservation and development of plant genetic resources as the basis of farmers' rights. The FAO Treaty further rationalises the

recognition of farmers' contributions by highlighting it as the basis of food and agricultural production throughout the world (Article 9.1).

The FAO Treaty adopts an approach different from that of the International Undertaking with regard to the conceptualisation of farmers' rights. The FAO Treaty follows an illustrative approach in defining the concept of farmers' rights by providing certain measures to protect and promote farmers' rights. The illustrated measures to protect and promote farmers' rights are: the protection of traditional knowledge relevant to plant genetic resources, the right to equitably participate in sharing benefits arising from the utilisation of plant genetic resources and the right to participate in decision making on matters related to the conservation and sustainable use of plant genetic resources (Article 9.2).

In addition to the illustrated measures, the FAO Treaty further recognises, in principle, the rights of farmers to save, exchange and sell farm saved seeds (Article 9.3). This traditional practice of farmers is recognised by prohibiting the interpretation of the provisions of the FAO Treaty in such a way to limit the rights of farmers to save, use, exchange and sell farm saved seeds.

Another important feature of farmers' rights as conceptualised under the FAO Treaty is the fact that the Treaty casts the responsibility for realising farmers' rights upon national governments (Article 9.2). By saying so, the Treaty grants flexibility to the concerned state parties to forge measures to protect and promote farmers' rights according to their needs and priorities and according to their domestic legislation.

C. Critiquing the FAO Treaty

The conceptualisation of farmers' rights under the FAO Treaty did not go much further from the International Undertaking. The only significant change introduced by the FAO Treaty in this regard is the recognition and assertion of the principle of sovereign rights over plant genetic resources. This is an apparent deviation from the International Undertaking wherein plant generic resources were considered as vested with international community.

This change in the basic legal approach cannot be completely attributed to the FAO Treaty. In fact, FAO Treaty seems to have followed the CBD in this regard. To this extent the FAO

Treaty can be considered as a success because one of the objectives of the negotiation was to make the plant genetic resources regime in harmony with the CBD. At the same time the FAO Treaty cannot be considered as a complete success in another major objective, that is, the concretisation, further development and realisation of farmers' rights.

The FAO Treaty does not go much beyond recognising the term 'farmers' rights'. Article 9 of the FAO Treaty uses completely the non-mandatory language. For instance, Article 9.2 does not make it obligatory for member countries to provide legal framework to ensure protection of traditional knowledge, benefit sharing and right to participation. The obligation of member countries in this regard is diluted by using the expression "Contracting Party *should, as appropriate, and subject to its national legislation*, take measures to protect and promote Farmers' Rights" (emphasis added).

FAO Treaty casts responsibility for the realisation of farmers' rights with national governments. This means, member countries have absolute freedom to decide the ways and means to be adopted for the realisation of the farmers' rights. This flexibility may create uncertainty as to the way in which farmers' rights are to be implemented at the national level and it may also delay the implementation process. In fact, the Governing Body of the FAO Treaty in its Resolution 2/2007 acknowledges that: "there is uncertainty in many countries as to how Farmers' Rights can be implemented and that the challenges related to the realization of Farmers' Rights are likely to vary from country to country" (FAO 2007).

Similar approach is reflected in the provision dealing with farmers' privileges also. Article 9.3 does not grant farmers the "right to save, use, exchange and sell farm-saved seed/propagating material" positively. Instead the provision adopts a different approach where in it prevents the interpretation of the FAO Treaty in such a way to limit these rights. Further, the scope these rights will be depended upon national legislation. Hence, in effect, farmer's privileges will be protected only if they are recognised and protected under concerned domestic legislation.

Hence, it could be stated that the FAO Treaty does not prescribe anything regarding farmers' rights. It only provides guidance in a limited way to the member countries on the ways through which farmers' rights may be protected.

From a developing country perspective, FAO Treaty cannot be considered as a complete success. This is particularly because, developing countries in their initial proposal raised

several key concerns such as collective rights of farmers with respect to their innovations, knowledge and cultural diverse systems, prior informed consent, traditional rights of farmers to keep, use, exchange, share and market their seeds and any other plant reproductive material, including the right to re-use farm-saved seed and modification of intellectual property rights systems to ensure that they are in harmony with the concept of farmers' rights. While looking at Article 9, it is clear that these concerns of developing countries have been watered down. In this regard, Bjørnstad opined that the FAO Treaty cannot be considered as a strong breakthrough for developing countries (Bjørnstad 2004: 48).

Another major issue arise in this context is related to the key contents of farmers' rights (Traditional Knowledge, Benefits sharing and right to participation) illustrated under Article 9. The farmers' rights provision under the FAO Treaty (Article 9) is silent as to the nature and scope of protection to be granted to these key aspects of farmers' rights. While benefit sharing has been dealt with under Article 13, other two illustrated contents are not at all addressed under the FAO Treaty.

The scenario becomes complex given the fact that the issue of traditional knowledge and benefit sharing are still unresolved issues at the international level. These issues are subject matters of ongoing negotiations in various international forums, particularly the CBD and WIPO. Hence, it can be seen that the outcome of the ongoing efforts in the forum of CBD and WIPO will be a crucial determining factor in the realisation of farmers' rights.

It could be concluded that FAO Treaty does not conceptualise farmers' rights in an effective manner. This is particularly true in a developing country point of view. As such the FAO Treaty is unlikely to make any significant output at the level of implementation. The way in which farmers' rights have been articulated under the FAO Treaty makes farmers' rights under the FAO Treaty perhaps little more than a policy statement.

Nevertheless, FAO Treaty is a landmark in the evolution of farmers' rights under international law. The importance of the FAO Treaty is that farmers' rights have been recognised under a legally binding multilateral instrument for the first time. Though in a loose and vague manner, the FAO Treaty defines 'farmers' rights'. Further FAO Treaty provides at least some illustrative ways through which farmers' rights may be implemented. Hence, FAO Treaty is a

foundation based upon which the idea of farmers' rights can be further concretized under international law.

5 Linkages with Other Treaty Regimes

As mentioned above the concept of farmers' rights has been developed as part of legal framework regulating plant genetic resources. The issues related to the management and regulation of plant genetic resources are a subject matter of more than one international agreement. These agreements have been negotiated in different international forums with different rationale and objectives. Rules envisaged under almost all of these regimes, directly or indirectly, address major issues pertinent to farmers' rights, that is, access to genetic resources, sharing of benefits arising out of its use and protection of traditional knowledge.

In this context, this part of the chapter proposes to examine the effect of multiple regimes on the concept of farmers' rights in three areas, namely, access and benefit sharing, farmers' privileges and the protection of traditional knowledge.

A. Access and Benefit Sharing

Access and benefit sharing have been dealt with under all regimes related to farmers' rights. For instance, the FAO Treaty primarily addresses the issue of access to plant genetic resources and envisages a multilateral system of access and benefit sharing (FAO Treaty: Article 10). The CBD also treats access and benefit sharing as one among three important objectives of the Convention (CBD: Article 1). Cumulatively both these regimes tend to promote and encourage access to plant genetic resources at global level and lay down rules and principles regulating sharing of benefits arising out of the use of plant genetic resources. The IPR regime also has linkages with the issue of access. This could be best explained by the fact that access to crop genetic resources is indispensable for inventions in the field of agriculture which can be protected with private property rights (Rosendal 2006: 431). Access is a matter of direct concern of the IPR regime in a different angle, that is, the question of access to plant genetic resources which have been protected with IPRs such as patent or plant breeders' rights.

Even though plant genetic resources are subject matters of all these regimes, the issue of access and benefit sharing is not addressed in a same or similar way. Owing to this variation, its

implications on farmers' rights could also be different. This variation could be attributed to differences in the basic premise in which and objectives for which all these regimes work.

The point of variations in treating access and benefit sharing under these regimes could be explained by highlighting a number of issues, most importantly, the basic approach in which these regimes address access and benefit sharing. The development of legal framework at the international level related to plant genetic resources began with the principle that plant genetic resources are common heritage of mankind. The CBD and subsequently the FAO Treaty brought about a significant change in this basic principle by embracing the principle of sovereign rights. Both the CBD and the FAO Treaty recognise sovereign rights of every state over its own plant genetic resources. Hence, the CBD and the FAO Treaty mark a shift from free and universal access to access regulated by concerned states.

However, the way in which access is regulated under these two regimes are not similar. Having based on the sovereign rights principle, the CBD envisages a bilateral mode of regulation. It means, matters related to access and benefit sharing will be decided between the country which provides the material and the receiver of the material. This bilateralism is evident in the key norms and procedures to be followed such as prior informed consent and mutually agreed terms (CBD: Articles 15.4 and 15.5). Whereas, the FAO Treaty envisages a multilateral system wherein facilitated access to genetic materials included in the Annex I of the treaty is available. The basic conditions upon which access is to be exercised are also mentioned in the treaty (FAO Treaty: Article 12.3). This means, in contrast to the CBD, the FAO Treaty tends to promote multilateralism. Hence, there is a significant divergence between the CBD and the FAO Treaty in the basic approach itself.

The IPR regime approaches access to plant genetic resources from a different angle. While the CBD and the FAO Treaty primarily addresses the issue of access to raw plant genetic resources, the IPR regime concerns mainly on access to worked plant genetic resources.[6] The

[6] Raw PGR are those found in the wild, such as a flower in the rain forest that contains a yet undiscovered gene that could cure cancer. Worked genetic resources, by contrast, are the products derived from that flower—such as the marketed cancer fighting drug. *See* Raustiala and Victor 2004: 279.

major concern of the IPR regime is to provide legal protection to commercial breeders who undertake manipulations on the raw resources and make new varieties. Consequently, the IPR regime tends to restrict or prohibit free access to worked plant genetic resources.

The IPR regime does not as such deal with the issue of benefit sharing. The major reason for this silence is understandable given its focus on worked plant genetic resources and its rationale being the protection of plant varieties produced in laboratories working with modern science and technology. However, the idea of fair and equitable benefit sharing is closely linked to the IPR regime.

This link could be seen in the fact that the basic objective of the principle of benefit sharing was to strike a balance between the legitimate rights of owners of germplasm and technology owners (Rosendal 2006: 432). To put it in a different way, benefit sharing could be seen as a counter-balance strategy in favour of farmers' and local communities who do not have any kind of property rights over their resources and knowledge against owners of worked plant genetic resources whose property rights are comparatively well protected under the IPR regime. This idea is expressly manifested under the CBD by accepting the aim of "sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial utilization of genetic resources with the Party providing such resources" (CBD: Preamble and Article 1).

Access and benefit sharing is not a resolved issue in international law. In fact, it is still in an evolving stage. Relevant fact, in this regard, to be noted is the parallel development of the issue of access and benefit sharing in different international forums. Access and benefit sharing has always been a major focus of attention under the CBD. The continued effort in this regard has culminated into the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, 2002 (Bonn Guidelines).[7] As the title indicates, this instrument is voluntary in nature and was adopted to assist member countries to frame legal, policy and administrative framework at the domestic level.

[7] Bonn Guidelines was adopted by the Conference of Parties to the CBD in its sixth meeting held in the Hague on 7-19 April 2002 (CoP Decision VI/24).

Having adopted the Bonn Guidelines, present effort is targeted towards an international regime on access to genetic resources and benefit sharing. An Ad Hoc Open Ended Working Group on Access and Benefit Sharing has been mandated by the seventh meeting of the Conference of Parties to "elaborate and negotiate an international regime on access to genetic resources and benefit sharing" (CoP Decision VII/19). The preparation of the international regime is expected to be completed before the tenth meeting of the Conference of Parties scheduled to be held in 2010.[8]

In parallel to this, the issue of access and benefit sharing is being addressed in the forum of World Intellectual Property Organization (WIPO). An Intergovernmental Committed on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has been constituted and this committee is in the process of preparing guidelines on access and benefit sharing. The WIPO Committee, however, looks the issue from the angle of intellectual property rights, that is, intellectual property aspects of equitable benefit sharing.

Apart from this, there is an attempt from the part of developing countries to bring the issue of access and benefit sharing in the forum of World Trade Organization. From a paper submitted by few developing countries including India to the TRIPS Council in 2002, it appears that developing countries push the agenda to amend the TRIPS agreement to include certain conditions to acquire patent rights in the context of biological resources. These conditions include disclosure of the source or country of origin, evidence of prior informed consent and evidence of fair and equitable benefit sharing.[9]

The link between access and benefit sharing and the IPR regime has a North – South perspective also. This could be seen from the fact that access and benefit sharing laws are increasingly being enacted in developing countries as a reaction to the expanding scope of IPR

[8] Ninth meeting of the Conference of Parties has instructed the Ad-Hoc Working Group to "finalize the international regime and to submit for consideration and adoption by the Conference of the Parties at its tenth meeting". *See* CoP Decision IX/12.

[9] World Trade Organization, TRIPS Council, The Relationship Between the TRIPS Agreement and the Convention on Biological Diversity and the Protection of Traditional Knowledge, Communication from Brazil on behalf of the delegations of Brazil, China, Cuba, the Dominican Republic, Ecuador, India, Pakistan, Thailand, Zambia and Zimbabwe, IP/C/W/356, 2002.

regimes. At the same time, access and benefit sharing laws are hardly in the agenda of developed countries in the north (Rosendal 2006: 440 - 441). Hence, it could be said that this factor might influence and determine the ongoing efforts at the international level in various forums towards a legal framework for access and benefit sharing. It is also likely that different states would use different forums according to their interests. Presuming this to be true, the ultimate outcome would be overlapping (and sometimes conflicting) legal frameworks at the international level that would further weaken the implementation at the national level.

Hence, it could be seen that the issue of access and benefit sharing is being discussed and negotiated in more than one international forum. This development is further characterised by the fact that the focus and rationale of these negotiations in different forum are not similar. While in one forum, the issue is discussed in the context of protection and conservation of natural resources, another forum looks at it in the context of international trade.

The parallel development of the legal regime of access and benefit sharing in various international forums would likely to have implications on farmers' rights, given the fact that access and benefit sharing is an important content of and a way to realise farmers' rights. The effective implementation of farmers' rights at the national level inevitably depends upon the results of these ongoing developments. For instance, a strict and strengthened IPR regime is unlikely to accommodate the key norms of prior informed consent and prior disclosure of country of origin. The idea of incorporation of these norms into TRIPS has already been criticised as over-stretching of patentability criterion and would retard scientific development (Dutfield 2005: 921). In this backdrop, the crucial factor is the way in which balance between conflicting interests is going to be drawn.

B. Farmers' Privileges

Farmers all over the world have been following the practice of using, saving, exchanging and selling seeds for centuries (Brush 1992). In fact, this practice is considered as the backbone of agricultural economy and therefore considered as inseparable from the maintenance of the social and economic structure of agricultural production (Correa 2000: 14). This is of particular significance to developing countries including India where agriculture has not yet been fully commercialised. In a farmers' rights point of view, this practice was a source of

seeds adapted to the local conditions and a source of income as well. These practices have found its manifestation in the language of legal rights through the FAO Treaty. The FAO Treaty, in principle, recognises the right of farmers to "save, use, exchange and sell farm-saved seed/propagating material" (FAO Treaty: Article 9.3).

The above mentioned farmers' practices, which have been generally termed as farmers' privileges, are at the core of interaction between farmers' rights and intellectual property rights regime. The IPR regime generally seeks to provide limited monopoly rights over new plant varieties. The term 'monopoly rights' essentially covers all possible commercial transactions such as selling, offering for sale, export and import (UPOV Convention 1991: Article 14.1). At the outset, it seems that the IPR regime seeks to restrict what has been expressly recognised as farmers' privileges under the FAO Treaty.

Application of intellectual property protection was originally considered as ineffective or irrelevant for the protection of plant varieties. This is mainly because of the fact that until the early twentieth century IPRs were considered as a legal regime that is applicable to commercial production of non-living beings. This principally covered mechanical inventions. Another major highlighted reason is the fact that plants are not 'produced' but they are bred. By and large, this process occurs naturally and the role of human beings in this process was limited to the creation of conditions for plants to reproduce themselves (Borowiak 2004: 514). This perception about plants and plant genetic materials supported and promoted the traditionally following practice of collecting, using and exchanging seeds which in the contemporary legal context termed as farmers' privileges.

However, a change in this scenario was triggered by the development of modern biotechnology. The development in this regard is said to have begun with the discovery of techniques for hybridizing corn in the United States in the early twentieth century (Borowiak 2004: 515). The major feature of the hybrid corn was that its desired characteristics were unlikely to repeat in the subsequent generations. Therefore, farmers were not able to reuse hybrid seeds from their fields without suffering crop yield. This development resulted in opening the possibility of overcoming biological barrier in plant reproduction and therefore the seed-saving practice of farmers. Further, it opened the wide possibility of capitalizing from investments in commercial breeding.

Parallel to the development of science and technology, there was mounting arguments in favour of legal protection to commercial breeders. It was mainly based on the notions of justice and development. The major argument raised in this regard was the injustice faced by commercial breeders. It was argued that the legal system provides a framework in which an inventor of a devise can gain reward for his invention. At the same time, the effort and investment in a process (plant breeding) that serve significant benefit to the society go unrewarded (Borowiak 2004: 516). This argument has two consequences. First, it tends to rationalise the legal protection for commercial breeders through IPRs. Second, it could be seen as aimed at restricting with the tool of law the seed-saving practice of farmers which cannot be restricted otherwise.

The development in the field of science and technology made it possible to produce transgenic plants with desired characteristics. Human interference with plants with the help of modern science and technology pulled the idea of intellectual property protection in the field of agriculture. Blakeney observes that "…with the extension of patent protection to recombinant methods for producing transgenic plants and resulting products, patents have begun to assume an increasing significance in plant variety protection" (Blakeney 2002: 13).

The possible implications of the intellectual property regime on farming practices and farmers in developing countries could be evident from couple of instances wherein developing countries have pushed the agenda for amending the TRIPS to include norms related to the protection of farmers' rights and farming practices. For instance, at a meeting of the non-aligned and developing countries held at New Delhi on 29-31 January 1999, a number of suggestions were made to amend patent provision under the TRIPS. These suggestions essentially included crucial norms related to farmers' rights such as disclosure of places of origin, prior consent and benefit sharing. In fact, the meeting recommended the inclusion of a comprehensive code of provisions protecting farmers' rights in national patent laws. In another instance, Kenya, in a communication to the TRIPS Council, proposed to include norms of protection of traditional knowledge, protection of farmers' privileges and food sovereignty as part of the provision dealing with plant variety protection, that is, Article 27.3.b (Blakeney 2002: 16).

An instance where direct impact of intellectual property regime on farmers' privileges could be seen in the UPOV 1991. Under the UPOV 1991, government may, as an optional rule, permit farmers to use protected varieties for propagating purposes on their own landholdings. It is important to note that this provision does not permit farmers to exchange or sell seeds. This is also an example where intellectual property regime shows a gradual strengthening of rules. Under UPOV 1978, these farmers' privileges were allowed at least to some extent.

The major legal consequence of the development and eventual strengthening of the UPOV on farmers' rights is the extended protection to commercial breeders and consequent legal manifestation of farmers' privileges as 'exception' to breeders' rights. For instance, the UPOV, 1991 mandates that farmers should obtain authorisation from the breeder to indulge in activities which are recognised as exclusive rights of the breeder such as production, reproduction and selling. The apparent legal consequence of this provision is the making of traditionally practicing farmers' privileges an 'unauthorised' act. Borowiak opines, in this regard, that "…the representation of traditional farming practices as 'unauthorized' suggests implementing a mode of governmentality that would oversee, regulate, and micromanage farmers' activities to prevent such abuses" (Borowiak 2004: 519).

The standard of intellectual property protection is further being strengthened through bilateral trade agreements frequently termed as TRIPS plus agreements. These TRIPS plus agreements envisage stronger and wider protection (Rosendal 2006: 436). In a farmers' rights point of view, this development would have implications on farmers' privileges, particularly at the implementation level. Because, having framed in a vague and soft language, farmers' rights regime would likely to be subjected to intellectual property laws at the level of implementation. Hence, a strong intellectual property protection at the national level means likelihood of lesser recognition and protection to farmers' privileges. In fact, it is observed that, the ongoing developments in the IPR regime tend to strengthen the intellectual property protection to biotechnology inventions (Rosendal 2006: 436).[10]

[10] It is to be noted, in this context, that some scholars argue that a well defined intellectual property rights regime would be in effect beneficial for all, particularly for developing countries. Boyd et al (2003) argues that the reluctance of the developing countries to implement stronger IPR protection to agricultural biotechnology
(footnote continued)

Implications of this legal framework need to be looked in the context of the extent of the farmers' privileges. A United Nations Development Programme (UNDP) study shows that 1.4 billion rural people rely on farm-saved seeds as their primary source of seed for next year's harvest (UNDP 1999: 68). In the Indian context, it has been observed that farm saved seeds and inter-farmer sales together account for more than eighty per cent of the total seed requirements (Ramanna 2006; Cullet 1999).[11] Therefore, dependence on seed market in every year most likely would have adverse implications on agricultural economy and farmers' livelihood.

Another impact of the increasing intellectual property protection is the potential threat to agricultural diversity. As the number of varieties protected by stricter plant breeder rights increases the number of traditional varieties are likely to decline or perish. The laboratory produced varieties might crowd out local varieties and ultimately leads to genetic erosion. This reveals a scenario that while one regime (the FAO Treaty) aspires to promote farmers' practices and privileges, other regime tends to curtail it in effect. In the specific context of farmers' privileges vis-à-vis IPRs, the *Schmeiser case* has specifically shown that a strong IPR regime is likely to restrict farmers' privileges. The striking of balance in this context depends upon the nature of each regime at the national level and the factor that how this problem has been addressed under the later regime.[12]

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innovations will ultimately deny the developing countries an opportunity to address some of their crucial issues such as economic development, environmental protection and public health. It is argued that the agricultural biotechnology offers a promising potential for developing countries given the ability of agricultural biotechnology to contribute towards increased food production, enhancement of nutritional value of food and thereby the overall social and economic development.

[11] A study conducted by the Gene Campaign in the state of Bihar establishes that nearly 70 -80 per cent of the farmers rely on traditional seeds from their own source. The majority of the remaining requirements are satisfied from farmer to farmer exchange and sale. It has been observed that only below ten per cent of the seed requirements are satisfied through formal markets (Sahai et al 2005).

[12] There are also contradictory opinions among scholars regarding the conflicting nature of different regimes. For instance, Gerstetter et al (2007) argues that theoretically there is no conflict between the FAO Treaty on the one hand and the UPOV and the TRIPS on the other hand. By taking the provision under the FAO Treaty on the protection of farmers' privileges, it is argued that the FAO Treaty does not grant any new rights to farmers. Instead, it simply seems to protect any existing rights under the national law which protects farmers' privileges. *(footnote continued)*

C. Protection of Traditional Knowledge

Protection of traditional knowledge is an important content of farmers' rights in international law. The FAO Treaty envisages protection of traditional knowledge as one of the three major illustrated ways through which farmers' rights are expected to be protected and promoted (FAO Treaty: Article 9.2.a). However, the FAO Treaty does not provide any guidance as to the nature, scope and meaning of the term 'traditional knowledge'. Neither the treaty provides any guidance as to the way in which traditional knowledge is to be protected. This gap leaves the question to be answered with the help of other relevant international documents and scholarly literature. Indeed, there are other regimes, particularly the CBD and the WIPO, which address these issues, though in different context and with different rationale.

The term 'traditional knowledge' denotes the knowledge which has evolved and is evolving in a continuous basis. It includes the knowledge of indigenous people or tribal people but it is not limited to these specific categories. In the context of farmers' rights, it denotes the knowledge of farmers or farming communities concerning wild and domesticated agricultural biodiversity (Cullet 2005: 288). To be more precise, the concept of traditional knowledge, most importantly, includes the knowledge regarding particular plant variety having desired characteristics and the process through which such variety has been developed.

The idea of traditional knowledge could be seen as a resistance or a counter-strategy against the increasing hegemonical influence of the western notion of science and technology (Drahos and Braithwaite 2003). This should be seen in the context of the development of international legal framework aimed to provide monopoly rights over knowledge systems produced with the

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Since the UPOV and the TRIPS precede the FAO Treaty, the provision related to the protection of farmers' privileges under the FAO Treaty will only has a residual effect. It means, the scope of the provision under the FAO Treaty will be interpreted in such a way to avoid conflict with the UPOV and TRIPS. While the arguments raised may be technically correct, the impacts of the UPOV and TRIPS regime on farmers' rights at a normative level cannot be neglected. Moreover, the impacts of overlapping regimes at the on the implementation at the domestic level have not been addressed in this analysis. In fact, the complexity at the domestic level is highly likely and it would be very difficult to arrive at a balancing regime at the domestic level.

help of modern science and technology which is largely dominated by the western notion. Practices, contributions and rights of indigenous or tribal people are, generally, considered as not in tune with the western notion of knowledge system. Therefore, the development of legal framework for the protection of knowledge and information at the international level, to a great extent, neglected the traditional knowledge system or considered it as not containing any significant value to be protected through legal framework (Cullet 2005: 289).

However, protection of traditional knowledge entered into international policy debates, at least, since the early 1990s. The demand in this regard was raised by developing countries and they used all available international forums to push it further. There are two obvious reasons why developing countries raised this issue at the international level. First, developing countries realised the potential commercial value of their traditional knowledge system as a significant input for the development of the so called modern scientific knowledge and technology. Second, the overwhelming part of traditional knowledge system has been developed and existing in developing countries.

The development, in this regard, at the international level could be traced back to the United Nations Conference on Environment and Development, 1992 (UNCED). Two documents adopted in this conference expressly highlight the need for the protection of traditional knowledge. The Declaration adopted at UNCED states that "indigenous people and their communities…have a vital role in environmental management and development because of their knowledge and traditional practices" (Rio Declaration 1992: Principle 22). Agenda 21 also expressly recognise the need to protect traditional knowledge (Agenda 21 1992: Chapter 26, Paragraph 26.3.a).

The prominent legally binding framework related to traditional knowledge is the CBD. The CBD, in principle, casts obligation upon the member countries to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity" (CBD: Article 8.j). The issue has been further progressed under the CBD regime by constituting a Working Group to develop *sui generis* protection of traditional knowledge. The mandate of the Working Group is to consider non-intellectual property based *sui generis* forms of protection of traditional knowledge, innovations and practices relevant for the conservation

and sustainable use of biodiversity.[13] Hence, it could be seen that traditional knowledge is relatively a novel concept in international law and the development of a *sui generis* system for the protection of traditional knowledge is still in an ongoing process.

The ongoing development with regard to the protection of traditional knowledge is not limited to the CBD regime. Development in this regard is also progressing in various international forums, most importantly in the WIPO. As opposed to the established objective of the ongoing efforts in the CBD regime to promote and develop a non-intellectual property based protection regime, the WIPO efforts are directed towards the scope of extending intellectual property regime to protect traditional knowledge. While both these efforts differ in the nature of rights sought to be granted to the holders of traditional knowledge, it appears to share at least some of basic norms through which these rights are expected to be protected. Among these, important norms are the norms of prior informed consent and mutually agreed terms in accessing and using traditional knowledge.

Since the development of the legal framework for the protection of traditional knowledge is in a premature stage, there is huge debate among scholars as to the nature of protection to be granted to traditional knowledge. Some scholars argue that a carefully drafted intellectual property regime is a fit case to protect traditional knowledge and it would enable realisation of farmers' rights. Cottier and Panizzon argue that an intellectual property protection in traditional knowledge constitutes another proprietary instrument for empowering farmers and agricultural communities (Cottier and Panizzon 2004: 386). It is further argued that an intellectual property based traditional knowledge regime would in effect help to promote conservation and maintenance of the traditional knowledge system and at the same time

[13] CoP Decision VII/16, Article 8(j) and Related Provisions: Section H: Development of Elements of sui generis systems for the protection of traditional knowledge, innovations and practices, in Report of the Seventh Meeting of the Conference of Parties to the Convention on Biological Diversity, UN Doc. UNEP/CBD/COP/7/21 (2004).

prevent misappropriation.[14] Another highlighted benefit is the possibility of proper, effective and continuous reward for right holders (Cottier and Panizzon 2004).

Another set of arguments highlights that traditional knowledge in particular and farmers' rights in general are not suitable to be protected through intellectual property system. This argument is mainly based on the reason that traditional knowledge system is significantly different from the knowledge system protected by intellectual property rights. Major difference lies in the fact that traditional knowledge, unlike the knowledge produced according to modern science and technology, is collective in nature and it is very difficult to identify precisely the beneficiaries (Blakeney 2002; Correa 2000; Cullet 1999; Odek 1994).

Another argument in this regard is based on the cultural aspects of traditional knowledge system. While the intellectual property system generally focuses on the commercial aspects of the knowledge systems, it may not be always work in the case of traditional knowledge system. It cannot be presumed that commercial benefits are the key interests the right holders of traditional knowledge including traditional farmers seek to achieve. There may be several other concerns or values attached to the traditional knowledge system including cultural value.

Hence, it is clear that more than one forum at the international level is playing key roles in the development of a legal framework for the protection of traditional knowledge. This parallel development at different forums having different focus and objectives would likely to influence and implicate farmers' rights. This is particularly relevant because the FAO Treaty does not go beyond recognising the protection of traditional knowledge as a way to realise farmers' rights. Therefore, the realisation of farmers' rights at the local level would be determined by these developments at the international level. Moreover, the possibility of an obscure normative framework cannot be overruled given the different directions in which the present efforts are moving. This may further weaken the implementation of farmers' rights.

[14] Liu (2007) points out that there are two major objectives sought to be achieved through a legal framework for the protection of traditional knowledge: first, the conservation of traditional knowledge and, Second prevention of unauthorised exploitation.

5. Conclusion

Having incorporated the term farmers' rights expressly, the FAO Treaty can be considered as a significant achievement. However, the way in which farmers' rights have been articulated under the treaty does not promise much for farmers in the field. Even though the FAO Treaty uses the term "farmers' rights", it does not guarantee or provide any concrete enforceable rights. In effect, the FAO Treaty does not make much difference from the situation prior to the adoption of the treaty. This makes the critique to state that "After all, you do not need an international treaty to state that countries have the right to prepare their own legislation" (Bjørnstad 2004: 46).

The scope and application of the FAO Treaty in relation to farmers' rights are limited. There are several incomplete or left-out areas under the FAO Treaty such as benefit sharing and the protection of traditional knowledge. These left-out areas inevitably link farmers' rights with other multilateral regimes, particularly the CBD, UPOV and WIPO.

Three key aspects of farmers' rights – access and benefit sharing, farmers' privileges and protection of traditional knowledge – links farmers' rights with other multilateral treaty regimes and institutions. These key aspects of farmers' rights are still in an evolving stage under these regimes. It is also a fact that the ongoing efforts under these regimes are not moving in a completely complementary manner.

For instance, access and benefit sharing and protection of traditional knowledge are some of the important issues of ongoing developments under different regimes such as the CBD and WIPO. While the efforts under the CBD regime seek to develop a *sui generis* non-intellectual property based legal framework, the efforts under the auspices of the WIPO seems to be moving towards an intellectual property rights based framework.

It could be concluded that farmers' rights as an international legal norm is in an evolving stage. The FAO Treaty provides the basis and definition of farmers' rights. At the same time some of the key aspects of farmers' rights such as benefit sharing and traditional knowledge are in an ongoing stage under different regimes. Hence, the concretisation of farmers' rights at the international level will depend upon the outcome of the ongoing efforts and their

complementarities. These developments at the international level will have significant implications upon the farmers' rights regime at the domestic level.

References

- Bjørnstad, Svanhild-Isabelle Batta (2004), Breakthrough for 'the South'? An Analysis of the Recognition of Farmers' Rights in the International Treaty on Plant Genetic Resources for Food and Agriculture, Lysaker: The Fridtjof Nansen Institute, FNI Report 13/2004.
- Blakeney, Michael (2002), "Protection of Plant Varieties and Farmers' Rights", *European Intellectual Property Review,* 24(1): 9-19.
- Borowiak, Craig (2004), "Farmers' Rights: Intellectual Property Regimes and the Struggle over Seeds", *Politics & Society*, 32 (4): 511-543.
- Boyd, Shari L. et al (2003), "Agricultural Biotechnology Innovation versus Intellectual Property Rights: Are Developing Countries at the Mercy of Multinationals?", *Journal of World Intellectual Property*, 6(2): 211-232.
- Brush, Stephen B. (1992), "Farmers' Rights and Genetic Conservation in Traditional Farming Systems", *World Development*, 20(11): 1617-1630.
- Correa, Carlos M. (2000), Options for the Implementation of Farmers' Rights at the National Level, Trade-related Agenda, Development and Equity (TRADE) Working Paper 8 (December 2000).
- Cottier, Thomas and Marion Panizzon (2004), "Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection", *Journal of International Economic Law*, 1(4): 371- 400.
- Cullet, Philippe (1999), "Revision of the TRIPS Agreement Concerning the Protection of Plant Varieties". *The Journal of World Intellectual Property*, 2 (4): 617-656.
- Cullet, Philippe (2005), *Intellectual Property Protection and Sustainable Development*, New Delhi: Lexis Nexis.
- Drahos, Peter and John Braithwaite (2003), "Hegemony Based on Knowledge: The Role of Intellectual Property", *Law in Context,* 21: 204-223.
- Dutfiled, Graham (2005), "Sharing the Benefits of Biodiversity: Is there a Role for the Patent System?", *The Journal of World Intellectual Property*, 5(6): 899-931.
- FAO (2007), Report of the Second Session of the Governing Body of the International Treaty in Plant Genetic Resources for Food and Agriculture held in Rome, 29 October – 2 November 2007, Doc. No. IT/GB-2/07/Report.
- Gerstetter, Christiane et al (2007), "The International Treaty on Plant Genetic Resources for Food and Agriculture within the Current Legal Regime Complex on Plant Genetic Resources", *The Journal of World Intellectual Property,* 10 (3 & 4): 259–283.
- Liu, Yinliang (2007), "Justification of Subject-matter for Legal Protection of Traditional Knowledge", *European Intellectual Property Review,* 29(11): 456-460.

- Odek, James O. (1994), "Bio – Piracy: Creating Proprietary Rights in Plant Genetic Resources", *Journal of Intellectual Property Law*, 2: 141-182.
- Ramanna, Anitha (2006), Farmers' Rights in India: A Case Study, Lysaker: The Fridtjof Nansen Institute.
- Raustiala, Kal and David G. Victor (2004), "The Regime Complex for Plant Genetic Resources", *International Organization,* 58: 277–309.
- Rosendal, Kristin (2006), "Balancing Access and Benefit Sharing and Legal Protection of Innovations from Biopropecting: Impacts on Conservation of Biodiversity", *The Journal of Environment and Development*, 15(4): 428-447.
- Sahai, Suman et al (2005), Farmer's Perception of Agrobiodiversity: A Study in North India, New Delhi: Gene Campaign, as cited in Ramanna, Anitha (2006), Farmers' Rights in India: A Case Study, Lysaker: The Fridtjof Nansen Institute.